

Decision 01-08-022 August 2, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) for Authority to Lease Available Land on the West Lugo-Mira Loma 500 kV Transmission Right of Way to Chuka Foods, Inc.

Application 00-12-041
(Filed December 21, 2000)

O P I N I O N

Summary

Southern California Edison Company (SCE) seeks authority to lease to Chuka Foods, Inc. (Chuka Foods) an 11.49-acre site located on a portion of SCE's West Lugo-Mira Loma 500 kV transmission right of way in the City of Ontario.¹ Chuka Foods will use the site to operate a retail shopping center, a use SCE states will not interfere with its utility operations. The application is unopposed. The application is granted.

The Agreement

The agreement grants Chuka Foods the option to lease the site for the development and operation of a retail shopping center facility. The initial term of the lease is 20 years, beginning on the date Chuka Foods exercises the option.

¹ The site is bounded on the southeast by Auto Center Drive; on the northwest by 4.71 acres of vacant land (owned by Chuka Foods); on the northwest by Jurupa Street; and on the southwest by the Interstate 15 Freeway.

Chuka Foods can renew the lease for two additional ten-year terms and one additional eight-year term.

Under the agreement, Chuka Foods will pay an annual base lease fee starting at \$51,929 in Year 1 and escalating to \$122,233 in Year 10. The base rent will be further adjusted upon the exercise of each renewal option to reflect the then fair rental value of the site, excluding the value of Chuka Foods' property improvements. In no event, however, will the adjusted base lease fee be less than the base lease fee otherwise payable immediately prior to such adjustment, or increase more than 3% per year compounded annually for ten years or compounded annually for eight years with respect to the third renewal option.

The agreement provides that Chuka Foods' activities must not interfere with the operation of the electrical transmission facilities that cross the site. Chuka Foods is not allowed to use or store hazardous substances, explosives or flammable materials on the site. Any equipment used by Chuka Foods on or adjacent to the property will be operated to maintain a minimum clearance of 35 feet from all overhead electrical conductors. SCE also requires Chuka Foods to maintain a minimum 100-foot radius around all tower legs, and a 10-foot radius around all steel and wood poles. Chuka Foods will provide and maintain access roads on the property.

SCE retains the right and authority to enter the site at all reasonable times to inspect the site. SCE also has the right to impose temporary restrictions on Chuka Foods' right to enter, occupy and use the site to thereby allow SCE to perform work, if necessary, on the electrical facilities located on the site. SCE also retains the right to take all or a part of the leasehold by eminent domain or inverse condemnation.

Chuka Foods is responsible for all personal property taxes, as well as other general or special assessments or fees levied against the site or the improvements thereon. Chuka Foods is also responsible for obtaining all permits and approvals for construction and any zone changes or use permits required for the operation of a retail shopping center facility from any agency having jurisdiction. Chuka Foods must also maintain appropriate comprehensive general liability insurance, comprehensive auto liability insurance, and workers' compensation insurance. Chuka Foods further agrees to indemnify SCE against all liability for damages or injury to persons or property on the site except to the extent caused by SCE's negligent or willful misconduct.

Determination of Best Secondary Use

The utility's objective in selecting secondary uses for utility sites is to find uses that provide the greatest revenue consistent with the utility's obligations to maintain the safety and reliability of its facilities. Because of the presence of above-ground power lines crossing the site, secondary land uses thereon are limited by operating restrictions and height clearances.

SCE states that the surrounding areas, the Cities of Ontario and Rancho Cucamonga, currently have a number of vacant, similarly zoned (light industrial) land parcels available for third-party development. In consideration of this, the SCE appraisal staff established a rental range for the 11.49-acre site by researching the sale prices of similarly zoned, local area land parcels and applying a fair market rate of return to the indicated sale prices. According to SCE, the annual base rent it will receive from Chuka Foods falls within the acceptable market range based on the study of these similarly zoned property sales and is in line with rents received in the transactions approved by the

Commission in Decision (D.) 96-12-024, D.99-02-035, D.99-02-036, D.99-03-016, D.99-04-066, D.00-02-041, and D.00-06-057.

Selection of Lessee

According to SCE, Chuka Foods was awarded the option to lease the site because of the proposed site use and the strong entrepreneurial background of the corporation's director, Ronald Smothers. He has over 25 years' experience in the development and operation of Burger King franchise restaurants. Together, Ronald Smothers and his wife, Ella, have developed and operated 12 Burger King Restaurants in various communities in and around Los Angeles, including the Garment District, Inglewood, Watts, and Culver City. During the past 25 years, Ronald and Ella Smothers have received numerous awards for both operational excellence in their restaurants and for exemplary community involvement.

Treatment of Revenues

The revenue from the license and the proposed lease will be treated as Other Operating Revenue (OOR). Under the gross revenue sharing mechanism, all applicable gross revenues recorded from non-tariffed products and services subject to the mechanism will be split between shareholders and ratepayers after the Commission-adopted annual threshold level of OOR has been met. For those non-tariffed products and services deemed "passive" by the Commission, the revenues in excess of the annual threshold will be split between shareholders

and ratepayers on a 70%/30% basis. The proposed lease here is passive for revenue sharing purposes.²

Environmental Reviews

Under the proposed lease, Chuka Foods will procure and deliver to SCE evidence of compliance with all applicable codes, ordinances, regulations, and requirements for permits and approvals from the various governmental agencies and bodies having jurisdiction.

Under the California Environmental Quality Act (CEQA), the Commission is obligated to consider the environmental consequences of a project that is subject to the Commission's discretionary approval. (Public Resources Code § 21080.) Since development of the property by Chuka Foods is subject to all applicable laws and receipt of discretionary approvals from the City of Ontario, the Commission may defer to the appropriate state and local authorities having jurisdiction over any proposed change in the use of the site. These authorities are generally in a superior position to evaluate local environmental impacts and develop appropriate mitigation strategies. The Commission has followed this course of action before in similar applications. (See D.99-02-036 and D.99-04-066).

Deference to local authorities is appropriate under the circumstances in this application. CEQA specifically applies to discretionary projects such as issuance of conditional use permits. (See Pub. Res. Code § 21080.) A proposal to

² In D.99-09-070, the Commission adopted a gross revenue sharing mechanism for certain other operating revenues.

change the use of the site here will require state and local authorities to conduct an environmental review under CEQA.

The Commission's staff has concluded that no further environmental review is required for the approval of this application by the Commission because environmental review will be required and conducted by local authorities in their discretionary approval of permits required prior to the start of construction. Local authorities are in a better position than this Commission to review the lessee's building plans and to assess any impact on the community.

Discussion

Section 851 of the Pub. Util. Code provides that no public utility "shall...lease... [property] necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing it so to do." The relevant inquiry for the Commission in Section 851 proceedings is whether the proposed transaction is "adverse to the public interest." The proposed lease satisfies this test. The public interest is not harmed since a lease will not affect in any way the utility's operation of the subtransmission lines on the site. Moreover, if the leased property becomes necessary for utility operations, SCE has reserved the right to exercise its power of condemnation to re-acquire any or all of the leasehold. The Commission has determined that the public interest is served when utility property is used for other productive purposes without interfering with the utility's operation.³ Because the proposed agreement will increase the level of revenues SCE can

³ We recently observed: The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers." (D.00-07-010, mimeo., at p. 6.)

obtain from secondary use of the land in question, with no additional ratepayer risk, the application should be approved.

Approval of this lease is conditioned upon compliance by lessee with all applicable environmental regulations. Should environmental claims, in whole or in part, related to the tenancy or activities of the lessee be made on SCE subsequent to the execution of the lease, SCE shall not seek recovery of any such claims, or defense of such claims, from ratepayers.

In the past, the Commission has treated applications, such as the instant application now before us, merely as requests by the utility to allow it to transfer a leasehold interest in utility property. The Commission does not approve the project itself and does not issue a permit for the project development. The Commission conditioned its approval of such proposed leases on lessee's compliance with all applicable environmental regulations. The Commission reasoned that local authorities are generally in a superior position to evaluate local environmental impacts and develop appropriate mitigation strategies. (See D.99-02-036 and D.99-04-066.) Accordingly, the Commission deferred to the local authorities to approve the project as a whole, subject to CEQA requirements.

However, to ensure that no development will take place without CEQA review by the appropriate agency, the Commission now proposes to change its procedures for future applications. Henceforth, we will require the utility to include with its applications copies of the necessary documents issued by the local entity acting as the Lead Agency to establish that the environmental review has been conducted and any mitigation measures required under CEQA have been imposed, or that the Lead Agency found that the project in question is exempt from CEQA. The Commission would then assume the role of Responsible Agency for CEQA purposes.

Since this is a change in our procedures, we will in this instance approve the instant application on condition that SCE submits the necessary documents within 120 days, to confirm that the Lead Agency has, in fact, conducted environmental review for this project.

Procedural Summary

Notice of this application appeared in the Commission's calendar dated January 4, 2001.

In Resolution ALJ 176-3054, dated January 4, 2001, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings were not necessary. Based on the record, we conclude that a public hearing is not necessary, nor is it necessary to alter the preliminary determinations in Resolution ALJ 176-3054.

Because the application is unopposed, and because our decision today grants the relief requested, the requirement for 30-day public review and comment is waived pursuant to Pub. Util. Code § 311(g)(2).

Findings of Fact

1. SCE is an electric public utility subject to the jurisdiction and regulation of this Commission.
2. SCE has property at the West Lugo-Mira Loma transmission line right of way in the City of Ontario available for secondary use, and it seeks to obtain revenue for ratepayers and shareholders through a secondary use lease.
3. Subject to Commission authorization required under Pub. Util. Code § 851, SCE has negotiated a long-term lease proposal for the available property to provide lease revenues with no interference with the operation of the transmission line.

4. The proposed lessee, Chuka Foods, is managed by Ronald Smothers, who has over 25 years experience in the development and operation of Burger King franchise restaurants.

5. Chuka Foods will finance, construct, and maintain a retail shopping center at the site, bearing the costs and making payments to SCE.

6. Revenue in excess of a Commission-established threshold will be shared 70%/30% between the utility and ratepayers, by treating all revenues as Other Operating Revenue, pursuant to D.99-09-070.

7. There is no opposition to this application.

Conclusions of Law

1. No public hearing is necessary.

2. Joint use of utility property should be encouraged in appropriate cases because of the obvious economic and environmental benefits.

3. The Commission should condition its approval of the proposed lease on lessee's compliance with all applicable environmental regulations.

4. SCE should be authorized pursuant to Pub. Util. Code § 851 to lease the designated 11.49-acre site to Chuka Foods on the terms and conditions set forth in the application.

5. The proposed sharing of revenues with ratepayers conforms to the Commission's order in D.99-09-070.

6. Should environmental claims, in whole or in part, related to the tenancy or activities of the lessee be made on SCE subsequent to the execution of the lease, SCE shall not seek recovery of any such claims, or defense of such claims, from ratepayers.

7. Because of the benefits of this lease agreement for the utility and for ratepayers, approval of this application should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company (SCE) is authorized to enter into a lease of an 11.49-acre site located on a portion of SCE's Lugo-Mira Loma transmission line right of way in the City of Ontario to Chuka Foods, Inc., under the terms and conditions set forth in this application.

2. As received, all revenues from the lease authorized shall be treated as Other Operating Revenue and shall be subject to the gross revenue sharing mechanism set forth in Decision 99-09-070.

3. Approval of this application is conditioned upon lessee's compliance with all applicable environmental regulations, pursuant to the California Environmental Quality Act (CEQA).

4. SCE shall notify the Director of the Energy Division, in writing, of any substantial amendments to, extension of, or termination of the lease agreement, within 30 days following the execution of such amendments, extensions or termination.

5. SCE shall within 120 days provide the Commission with copies of the documents issued by the local entity acting as Lead Agency to establish that the environmental review has been conducted and any mitigation measures required

under CEQA have been imposed, or that the project is exempt from CEQA pursuant to CEQA Guideline 15332.

6. Application 00-12-041 is closed.

This order is effective today.

Dated August 2, 2001, at San Francisco, California.

LORETTA M. LYNCH

President

RICHARD A. BILAS

CARL W. WOOD

GEOFFREY F. BROWN

Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.